BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARY D. JENNINGS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1000142
U.S.D. 305	)	
Respondent	)	
AND	)	
	)	
CONNECTICUT INDEMNITY	)	
INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (Respondent) requested review of the preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore on December 21, 2001.

Issues

Respondent raised the following issues for Appeals Board (Board) review:

1. Did Judge Moore exceed his authority in finding that claimant sustained a personal injury by accident in the course and scope of his employment through a series of repetitive traumas?

2. Did claimant fail to give notice of injury in a timely fashion?

3. Did Judge Moore exceed his authority in ordering Dr. Jeryl Fullen as the authorized treating physician despite respondent's provision of authorized treatment through Dr. James Shafer?

4. Does Judge Moore's Order violate K.S.A. 44-510h(b)(1) requiring the Court to allow respondent to provide a list of three physicians to claimant?

Findings of Fact and Conclusions of Law

After reviewing the preliminary hearing record and considering the briefs of the parties, the Board finds as follows:

1. Claimant filed a form E-1 Application for Hearing on November 15, 2001, alleging a series of accidents, but designated no beginning date and no ending date for the series of accidents: "Series through approximately October 19, 2001 and continuing" due to "Usual job activities involved in carpentry work." The form E-3 Application for Preliminary Hearing contains the same language. In his December 21, 2001 preliminary hearing Order Judge Moore made a date of accident finding; "The Court finds that Claimant's left knee injury was suffered as a product of an ongoing series of traumas from performing normal work duties." Implicit in the Administrative Law Judge's (ALJ) award of benefits is a finding of timely notice.

2. In its brief to the Board, respondent seems to admit claimant sustained a left knee injury on or about March15, 2001. Respondent also seems to acknowledge claimant gave notice of his accident and injury to respondent on October 19, 2001, but argues this notice was untimely for a March 15, 2001 accident. Implicitly respondent concedes that if claimant suffered a series of accidents, then this notice was timely.

> Based upon the evidence in the record, the Appeals Board should find that claimant has proven an accidental injury on March 15, 2001, and that claimant has failed to establish that he suffered an aggravation each and every working day after March 15th. Based on an accident date of March 15, 2001, claimant's October 19, 2001 notice of injury to respondent was untimely under the ten day requirement of K.S.A. 44-520. Therefore, benefits to claimant should be denied.[1]

3. Although claimant had some conversations with his supervisor, Larry Gagnon, about his knee, claimant admits the first time he formally reported a work-related injury was October 19, 2001, when he asked respondent's worker compensation representative, Fred Corn for a referral to a physician. At that time Mr. Corn referred claimant to Dr. Shafer.

4. Claimant has worked 31 years for respondent. His job as a carpenter requires him to perform various duties including hanging sheetrock, building walls, hanging doors, putting base on, laying tile, installing ceilings and shingling roofs. He is required to climb ladders, lift and carry objects weighing up to approximately 100 pounds, crawl, squat and kneel. All of these activities put stress on his knees.

---

[1] Brief of Respondent U.S.D. 305 at page 4.

5. Claimant described a gradual onset of his left knee problems. He also described an incident occurring on or about March 2001 after unloading a truck. He did not recall having an accident or a specific onset of pain while performing that work, but acknowledged having some increased pain at the end of the day and later that evening at home. He testified that thereafter his pain worsened. He attributed this pain to his work. He did not miss work due to this condition until October 2001 when he reported his injury.

6. Claimant was first seen by Dr. Shafer on October 23, 2001. Eventually, he ordered an MRI, but as far as claimant knew, no followup treatment was recommended. Claimant was examined by orthopedic surgeon, Sergio Delgado, M.D. at the request of his attorney, on December 6, 2001. Dr. Delgado diagnosed a partial tear of the medial meniscus and recommended surgery.

Conclusions of Law

Respondent contends claimant failed to prove a series of accidents and injuries arising out of and in the course of his employment and failed to provide timely notice of his accidental injury. A resolution of the dispute over the applicable date of accident is dispositive of both issues.

When dealing with injuries that are caused by overuse or repetitive micro-trauma, it can be difficult to determine the injury's cause. It is also often difficult to determine the injury's date of commencement and conclusion. In those situations, injured workers should not be held to absolute precision when considering the requirements of notice and written claim. The test should be whether the employer was placed on reasonable notice of a work-related injury. The recent Kansas appellate court decisions concerning accident date appear consistent with this philosophy.[2] The last date worked rule first announced in *Berry*[3] also establishes the date of accident for computing the time for giving notice.

K.S.A. 44-520 requires notice of accidental injury be given to the employer within ten days. The time for giving notice can be extended up to 75 days for just cause. But just cause is not an issue here. Claimant knew he was injured and attributed his injury to his work duties long before he gave notice. Although he was able to continue working and may not have known the precise cause for his pain or the severity of his injury, just cause has not been argued or alleged. Instead, the parties focus on accident date and a determination of that issue will be dispositive of the notice issue because either claimant

---

[2] *See Treaster v. Dillon Co., Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Anderson v. Boeing Co.,* 25 Kan. App. 2d 220, 960 P.2d 768 (1998); *Alberty v. Excel Corp.*, 24 Kan. App. 2d 678, 951 P.2d 967, *rev. denied* 264 Kan. 821 (1998); *Durham v. Cessna Aircraft Co.,* 24 Kan. App. 2d 334, 945 P.2d 8 (1997).

[3] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

suffered a single traumatic injury on or about March 15, 2001 or claimant sustained injury by a series of accidents through October 19, 2001 and continuing.

Claimant's testimony is that he did not suffer a single specific traumatic event. Instead, his work caused a gradual onset of symptoms and a progressive worsening of his condition until he felt he was no longer able to perform his job and, therefore, sought medical treatment from his employer. The Board finds claimant's testimony is more probably true than not true. In repetitive trauma cases Kansas courts have shown a clear preference for finding one accident date and one injury.

> Under our statutory scheme, disability compensation must begin at some fixed point in time. In the case of disability which is the result of a personal injury caused by accident, the date of the accident becomes the date from whence compensation flows. K.S.A. 44-510e(a)(1). In the case of an occupational disease, the injury or condition is deemed to have "occurred" on the last day worked. K.S.A. 44-5a06.[4]

The date of accident can be either when claimant leaves work due to the injury or:

> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[5]

Obviously, claimant suffered an accidental injury or injuries to his left knee while working for respondent. A single accident date is not easy to ascribe because he never left that job because of his injury, which is one of the triggering events described in *Treaster*. Thus, if claimant suffered a series of repetitive trauma injuries from his employment with respondent, it is an ongoing injury because he continues to work there at the same unaccommodated job. The ending date of that series of accidents has not been established.

Therefore, for purposes of preliminary hearing the date of accident for determining the timeliness of the notice will be October 19, 2001, the day claimant actually reported his accidental injury and requested medical treatment. Based upon that accident date, claimant has satisfied the reporting requirements of the Act. The Board finds claimant has

---

[4] *Berry* at 228.

[5] *Treaster*, Syl. ¶ 4.

proven a work-related injury from a series of mini-traumas beginning approximately March 2001 and continuing each and every working day thereafter.

It is important to note that these cases dealing with date of accident for repetitive trauma injuries were generally concerned with establishing a single date of accident for the purpose of computing the award and affixing liability for permanent disability compensation, not for preliminary medical or temporary disability benefits. Subsequent cases have extended the legal fiction of a single accident date to determine what law would apply to the claim. But this does not mean that the injury in fact occurred on only one day. By definition, a repetitive trauma injury occurs over a period of time and, as in this case, medical treatment can be needed before the "date of accident." Therefore, the fact that we are dealing with a series of accidents cannot be lost sight of when determining a single "date of accident" for legal purposes in applying the Workers Compensation Act. It is possible, therefore, to have one accident date for purposes of an award of permanent disability and another for purposes of awarding preliminary benefits.[6]

Claimant is asking for additional medical treatment. Judge Moore granted claimant's request. The ALJ's Order also named Dr. Fullen as the authorized treating physician. Respondent argues that in so doing the ALJ violated provisions of K.S.A. 44-510h(b)(1) which states in pertinent part as follows:

> If the director finds, upon application of an insured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the insured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

The Board has ruled in the past and continues to hold that this is not a jurisdictional issue subject to review on an appeal from a preliminary hearing Order.[7] Jurisdiction is

---

[6] *Lott-Edwards v. Americold Corp.,* 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

[7] *See Briceno v. Wichita Inn West*, WCAB Docket No. 211, 226 (Feb. 1997) and *Graham v. Rubbermaid Specialty Products*, WCAB Docket No. 219, 395 (June 1997).

described in *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P2d 552, *rev. denied* 221 Kan. 757 (1977), as follows:

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly. (Citations omitted.)

The workers compensation administrative court has limited jurisdiction. Its subject matter jurisdiction is limited to cases involving accidental injuries arising out of and in the course of employment. Whether claimant suffered accidental injury and whether the injury arose out of and in the course of employment are, therefore, designated in K.S.A. 44-534a as jurisdictional issues. Personal jurisdiction requires notice and timely written claim. Notice and written claim are also designated as jurisdictional issues under K..A. 44-534a. Whether the ALJ must, in a given set of circumstances, authorize treatment from a list of three physicians designated by respondent is not a question which goes to the jurisdiction of the ALJ. An ALJ has the jurisdiction to decide this question. Furthermore, at the preliminary hearing in this case the respondent denied the compensability of this claim. That is the equivalent of denying claimant the preliminary hearing benefits of medical treatment. Therefore, at the time of the preliminary hearing, there was no authorized treatment being provided to claimant.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the October 21, 2001, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2002

_____
BOARD MEMBER

c: Anton C. Andersen, Attorney for Respondent
Jan L. Fisher, Attorney for Claimant
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Workers Compensation Director